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July 19, 2004

VIA ELECTRONIC MAIL

RECEIVED

JUL 19 2004

Federal Communications Commission
Office of Secretary

Marlene M. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Meeting by Core Communications, Inc.
CC Docket No. 99-68, CPD Docket No. 01-171, and WCB Docket No. 03-171

Dear Ms. Dortch:

Pursuant to section 1.1206 of the Commission's rules, I hereby submit in the above-captioned proceedings this notice of an ex *parte* meeting held on July 16, 2004 between Bret Mingo and myself on behalf of Core Communications, Inc. ("Core"), Pat Williams from the Cormac Group and Dan Gonzalez from the FCC. The attached documents served as the basis of discussion. Core also discussed the merits of its pending forbearance petition and the events that led up to the filing of that petition. This notice of *ex parte* is being filed by hand in CPD Docket No. 01-171, as electronic filing is not available in that docket.

If you have any additional questions, please contact the undersigned.

Sincerely,

Michael B. Hazzard
Counsel for Core Communication, Inc.

Attachment

cc: Dan Gonzalez (electronic mail)
Brett Mingo (electronic mail)
Pat Williams (electronic mail) m

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TAB A

Overview of

CoreTel Communications, Inc.

Bridging the Worlds of Internet & Telecom

Founding

- Core Communications, Inc (now a subsidiary of CoreTel Communications, Inc.) was formed in August 1997
- Original goal was to provide both data and telephony services, specializing in the services that bridge the gap between traditional telephone networks and the rapidly changing data networks.

Specialization is Key

- As a small business, we realize the need to remain specialized - it is our competitive advantage, and a basic tenet of market economics.
- Part of that specialization is to remain a carrier focused on providing services on a wholesale basis - we do not provide end user services.
- Wholesale services include internet connectivity to ISPs, data server collocation, and managed modem services (both regulated and enhanced).

Creating Wholesale Channels

- All of our services are provided to service providers who in turn bundle additional services and use our wholesale product as a portion of the service they provide to their end user customers.
- Providing wholesale services to channel partners requires different productization than providing services to end users.
- Automation and integration of provisioning processes are key facets of our customers' satisfaction, and our understanding of our channel partners needs is a key part of our competitive advantage.

Regulatory Exposure

- Unfortunately, being wholesale also leaves CoreTel greatly exposed to shifting regulatory climates and rate structures
- CoreTel has a relatively small percentage of the end user value chain with which to absorb any negative change. We cannot pass on to the end user the change - they are our customers' customers.

Next Generation Wholesale Services: Connecting SIP/VoIP Services to the PSTN

- With advent of VOIP and SIP applications, and companies built around developing these applications, our focus is once again to automate and integrate provisioning for this new class of wholesale customer.
- Our business plan is to sell "a la carte" services that provide connectivity between these new application providers and the PSTN
- Target customers include ITSPs, IVR providers, interconnect vendors, PBX installers, fax bureaus: any data integrated service provider that is SIP-ready can pick and choose the wholesale service that fits their needs.

Sample VOIP/SIP Applications

- An IVR provider needs many simultaneous inbound PSTN channels, using a few telephone numbers
- A PBX installer wants an ability to provision bi-directional PSTN connected IP trunks - an IP PRI, if you will - with flexible options.
- An ISP which sells a Fax-to-Email service wants an ability to reliably provision a single number at a time, to a specific end user email account, with as low a transaction cost as possible, and without the need to inventory the service.

Deploying Soft Switch Technology

- To support these new customer needs, we have developed our own SIP-based soft switch, taking advantage of the properties of distributed data networks, rather than forcing VoIP implementations to mirror the traditional channel-switched world.
- Because of the cost of channelized switch ports, large capacity traditional switches are extraordinarily more cost effective than small ones, which leads to inefficient use of transport networks.

TAB B

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Before the
Federal Communications Commission
Washington, D.C. 20554

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MAY 1 6 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	CC Docket No. 96-98
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	

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COMMENTS OF BELL ATLANTIC

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May 16, 1996

A similar proxy is available to the extent LECs already offer elements under effective tariffs at either the federal or state level. For example, some network elements, such as dedicated transport, common transport, tandem switching, and collocation cross-connects already are available under special access tariffs of switched access, while other network elements, such as unbundled local switch ports, already are available under state approved, cost-based tariffs. Under these circumstances, the rates contained in the tariffs also should be treated as presumptively lawful for purposes of section 251.

IX. The Reciprocal Compensation Provision of the Act Requires, at a Minimum, that Carriers be Allowed to Recover the Cost to Terminate Calls on Their Networks

The Act also imposes a duty on all local exchange carriers -- incumbents and new entrants alike -- to establish reciprocal compensation arrangements for the "transport and termination" of telecommunications. 47 U.S.C. § 251(b)(5). In contrast to the interconnection provision in section 252(d)(2), which applies to the physical connection between the competing networks, the reciprocal compensation provision applies only to the transport and termination of local calls that originate on another carrier's network once the physical connection has been established. The reciprocal compensation provision is accompanied by a separate pricing standard -- to be applied by state commissions in any arbitration proceedings under section 252 -- that is tailored to the particular circumstances when it applies.

Specifically, the Act provides that a state commission shall not consider such arrangements to be just and reasonable unless they provide for the mutual and reciprocal recovery by each carrier of the additional costs incurred to terminate calls that originate on the other carrier's network. 47 U.S.C. § 252(d)(2)(A). Unlike the pricing standard for interconnection and access to network elements, this provision does not require that the price ultimately set be "based on cost," but instead establishes a price minimum. Accordingly, the parties must, at a minimum, be able to recover their costs on a reciprocal basis. Precisely because these arrangements are reciprocal, however, and each party must pay the other reciprocal rates, the Act establishes only a minimum, and leaves it to the parties to determine the precise terms above this minimum.

The Act also permits a limited exception to this general rule. The pricing standard does not "preclude" arrangements between the parties that allow the recovery of cost through the "offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." Section 252(d)(2)(B)(i) (emphasis added). By its very terms, this provision creates an exception to the right to recover the costs of transporting and terminating calls only where the parties voluntarily waive this right. In fact, by definition, the term "waive" means to "relinquish voluntarily (as a legal right)." See Webster's Third New International Dictionary (1993); see also Black's Law Dictionary (6th ed. 1990) "([t]o give up [a] right or claim voluntarily"). It does not, however, permit arrangements such as bill and keep to be imposed by regulatory mandate, whether in the context of an arbitration or as an interim measure. NPRM at ¶ 243.

Moreover, because bill and keep requires LECs to incur the cost of terminating traffic over their networks but precludes them from recovering these costs, a mandated bill and keep arrangement would constitute a taking in violation of the Fifth Amendment. A bill and keep arrangement would permit local competitors to occupy the LECs' facilities -- wires and switches -- in much the same way that an easement allows the holder to occupy part of a landowner's property. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 831-31 (1987). And it would allow them to do so at a zero rate that would leave the LECs without any compensation for the cost imposed on them by this occupation of their property. As a result, a regulatorily mandated bill and keep arrangement simply cannot pass constitutional muster. See Richard A. Epstein, The FCC Bill and Keep Order: A Takings Analysis, CC Docket No. 95-185 (May 16, 1996). Since it is well established that "[w]ithin the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions," the Commission cannot interpret the Act to permit mandatory bill and keep compensation schemes. Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994); see also Rust v. Sullivan, 500 U.S. 173, 190-91 (1991).

Nor would mandating bill and keep make sense from an economic or policy standpoint, even if such mandatory arrangements were not already forbidden by the Act and the Constitution. Mandating bill and keep would force LECs to terminate calls on their networks at a zero rate that is unquestionably below cost. This would create a subsidy for competing providers like AT&T, MCI, MFS, Teleport, TCI, Time Warner, and the nation's largest cable companies, who by no stretch of the imagination are in need of one. It would do so, moreover, at a time that Congress has directed the Commission to eliminate hidden subsidies, and would force the LECs' other customers to bear the cost of this subsidy. And because bill and keep frees a competing provider from any accountability for the costs it imposes on the incumbent LEC, bill and keep eliminates any incentive to use the LECs' termination service efficiently and will lead to economically wasteful behavior. Hausman Aff. at 9-10.

Presuming bill and keep is rejected, as it must be, the notice asks whether there is a readily available proxy that could be used by state commissions to benchmark the reasonableness of reciprocal compensation rates. NPRM at ¶ 234. As discussed above, given the wide variations in the industry, any fixed proxy is problematic and must allow for individual variations. Nonetheless, it may be possible to derive a proxy for a presumptively lawful reciprocal compensation rate from existing access charges. According to the Commission, for example, the national average charge for switched access is approximately 1 cent per minute (once the CCLC and RIC are deducted), plus an additional 2 tenths of a cent per minute for tandem switching and transport when a call terminates at an access tandem. See Bill and Keep NPRM at n.83. These rates were initially established based upon regulatorily prescribed costs, and have been subject in most cases to price caps for over 5 years. NPRM at ¶ 234. As a result, any reciprocal compensation rate that is set at or below these levels should be presumed lawful, without a further showing.

These numbers also answer an additional question raised by the notice: Whether the reciprocal compensation rates paid by competing carriers to one another must be symmetrical in every instance, by which the notice apparently means "the same." NPRM at ¶ 235. There is one instance in which the answer is clearly no. The reciprocal compensation rate for calls delivered to an access tandem -- for which the terminating carrier will incur the cost of tandem switching and transport -- should be allowed to be higher than for calls delivered to an end office -- which do not incur those additional costs. MFS Intelenet, Case No. 8584, Phase II, Order No. 72348 (Dec. 28, 1995) at 31. This would allow LECs to more accurately reflect their underlying cost structure. And by permitting an originating carrier to obtain a lower rate by opting to deliver traffic at the end office as traffic volumes grow, it would also provide correct economic incentives to make efficient use of the terminating carriers network, and thereby help to avoid inefficient overloading of tandem switches.

X. The Commission Should Not Adopt Resale Rules that Inhibit Negotiations or Preempt State Authority Over Resale

As with the other parts of section 251, the resale provision relies upon negotiations between the parties, and state arbitrations where negotiations fail. In order to allow this process to work as Congress intended, the Commission should limit any regulations it adopts to implement the resale provision to the following general guidelines.

A. Discounts Should be Based Upon Net Avoided Costs; Avoided Retail Costs Should Be Offset by Costs to Provide Wholesale Services

The Commission has correctly noted that avoided costs should be determined on a "net" basis. Any marketing, billing, collection, and similar costs that are associated with offering retail services should therefore be "offset by any portion of those expenses that [LECs] incur in the provision of wholesale services." NPRM at ¶ 180. This conclusion is sound because a LEC providing retail telecommunications services to resellers must incur costs to market, bill and collect for those services.

Because wholesale services may be provided in several different ways, moreover, the expenses associated with doing so will likely vary across resellers. For example, high volume resellers may order wholesale service through electronic interfaces while other resellers may rely on manual processes, such as telephone calls and faxes. The Commission's guidelines should therefore allow the parties to negotiate the costs of providing wholesale services as either a reduction to wholesale discounts or as separate charges. They should not attempt to prescribe a cookie cutter formula for setting wholesale rates.

B. State Commissions Must Be Permitted to Impose Reasonable Class of Service Restrictions

The Act preserves the authority of states to "prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers." 47 U.S.C. § 251(c)(4)(B). As an example of a reasonable resale restriction, the Commission correctly states that Congress never intended to allow competing carriers to purchase a service offered at subsidized prices to a specified category of subscribers and then resell it to customers that are not eligible for the subsidized service. NPRM at ¶ 176. The Commission's guidelines should therefore preserve state authority to impose reasonable class of service restrictions.

Preempting state authority to impose such restrictions, on the other hand, would place LECs at a severe competitive disadvantage and undermine their existing rate structures. For example, business rates generally are higher than residential rates for comparable services in order to subsidize these latter customers. If services could be purchased at wholesale residential rates and resold to business customers, the LEC's higher business rates would no longer be competitive and the public policy basis for separate residential and business retail rates would be undermined.

C. Wholesale Pricing Obligations Do Not Apply to Discount and Promotional Offerings

Any Commission guidelines should make clear that the obligation to offer services for resale at wholesale rates extends only to the incumbent LEC's standard retail

TAB C

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF BELL ATLANTIC

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May 30, 1996

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recovering their total costs would constitute an unauthorized taking of the LECs' property. Epstein Decl. at 2 (attached as Exh. 2). Nonetheless, the proponents of incremental cost pricing claim that there can be no taking when revenues are lost to competition. Perhaps so. But that is not the issue here. The issue here is whether government regulators can mandate prices that deny LECs the ability to recover costs they have actually incurred. They cannot. See, e.g., Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989); Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1178 (D.C. Cir. 1987) (en banc)

VII. Prices for Reciprocal Compensation Cannot Be Set At Zero

The most blatant example of a plea for a government handout comes from those parties who urge the Commission to adopt a reciprocal compensation price of zero, which they euphemistically refer to as "bill and keep." A more appropriate name, however, would be "bilk and keep," since it will bilk the LECs' customers out of their money in order to subsidize entry by the likes of AT&T, MCI, and TCG. As we demonstrated in our opening comments, a regulatorily mandated price of zero -- by any name -- would violate the Act, the Constitution, and sound economic principles. See Bell Atlantic Br. at 40-42.

Indeed, the proponents of bill and keep appear to recognize the flaws in their proposal, and shift their focus here to arguing that the FCC should mandate bill and keep as an "interim" pricing mechanism, and as a default price when parties do not agree to a different rate. AT&T Br. at 69; MCI Br. at 52-53; TCG Br. at 83-84.[19] This will create a "threat point," so the

[19] Some parties also have suggested that the cost to terminate calls during off-peak periods is very low, and that setting prices at zero during those periods is close enough. In reality, while setting different peak and off-peak prices may make sense in some contexts, here it would merely encourage providers to find ways to modify their traffic flows -- and thereby effectively change the peak -- in order to take advantage of the zero rates while forcing LECs to incur peak load costs. Under these circumstances, peak and off-peak users must share the costs

argument goes, that will encourage LECs to negotiate reasonable rates for reciprocal compensation. But whether they are termed interim or permanent, mandatory bill and keep arrangements suffer from the same flaws, and simply cannot be squared with the Act's mandate that LECs be permitted to recover their costs absent a voluntary waiver of that right. Bell Atlantic Br. at 42. Nor will adopting bill and keep as a mandatory solution encourage parties to negotiate a reasonable price. It will do the opposite So long as competitors know that they can get a zero rate if they do not agree to something else, the result will be bill and keep in every case.

Moreover, the notion that bill and keep is necessary to prevent LECs from demanding too high a rate reflects a fundamental misunderstanding of the market. If these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound, such as credit card authorization centers and internet access providers. The LEC would find itself writing large monthly checks to the new entrant. By the same token, setting rates too low will merely encourage new entrants to sign up customers whose calls are predominantly outbound, such as telephone solicitors. Ironically, under these circumstances, the LECs' current customers not only would subsidize entry by competitors, but would subsidize low rates for businesses they may well not want to hear from

---

of capacity, and it would be irrational to set a price of zero during any period. See Kahn, The Economics of Regulation, Vol. 1 at 91-93.

TAB D

Core-Verizon Interconnection Timeline

1999	Core begins substantial investment for implementation of its business plan in Delaware, New York and Pennsylvania.
February 2000	Core requests interconnection with Verizon in Philadelphia.
June 2000	Core requests interconnection with Verizon in Pittsburgh and New York City.
April 2001	FCC issues *ISP Remand Order* – growth cap and new market bar apply for all carriers that were not exchanging traffic pursuant to an interconnection agreement prior to **April 18, 2001**.
April 2001	**14 months** after Core's request, Verizon completes interconnection with Core in Philadelphia. Core begins to offer service in Philadelphia.
June 2001	**12 months** after Core's request, Verizon completes interconnection with Core in Pittsburgh and New York City. Core begins to offer service in Pittsburgh and New York City.
February 2004	Maryland Public Service Commission finds Verizon "violat[ed] the standards of the [interconnection agreement, incorporating the 1996 Act,] that require interconnection equal in quality; at a technically feasible point; and that is just, reasonable and nondiscriminatory; in addition to fail[ing] to meet a commercially reasonable standard of good faith."

TAB E

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68.

To some observers, the Telecommunications Act of 1996 ("1996 Act"), in general, and sections 251 and 252 (47 U.S.C. §§ 251 and 252), in particular, have become unnecessary inconveniences. The poster child for those who proclaim the 1996 Act's failure is reciprocal compensation. It has led to large billings – some paid, some unpaid – among telecommunications carriers. These billings have not shrunk, in large part because the Commission's interpretation of the pick-and-choose provision of the Act (47 U.S.C. § 252(i)) has led to unstable contracts, with perverse incentives for renegotiation.

Reciprocal compensation is an obscure and tedious topic. It is not, however, a topic that Congress overlooked. To the contrary, in describing reciprocal compensation arrangements in sections 251 and 252, Congress went into greater detail than it did for almost any other commercial relationship between carriers covered in the 1996 Act. Among other things, Congress mandated that reciprocal compensation arrangements would be:
(1) made by contract; (2) under State supervision; (3) at rates to be negotiated or arbitrated; and (4) would utilize a bill-and-keep plan only on a case-by-case basis under specific statutory conditions. *See* 47 U.S.C. §§ 251(b)(5), 252(a), 252(b), 252(d)(2).

Faced with these statutory mandates, how should the large billings for reciprocal compensation be addressed? Renegotiating contracts would be the simple market solution, only made precarious by our pick-and-choose rules. Another solution would be to seek review of reciprocal compensation agreements by State commissions. Other solutions would be for this Commission to change its pick-and-choose rules or to issue guidelines for State commission decisions (*see AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 385 (1999)).

Each of these solutions, of course, would reflect at least a modicum of respect for States, their lawmakers, their regulators, federal law, and the Congress that enacted the 1996 Act. Each would also be consistent with, and respectful of, the prior ruling on reciprocal compensation by the Court of Appeals for the D.C. Circuit. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

There is, however, one solution that is not respectful of other governmental institutions. It is a solution that places under exclusive federal jurisdiction broad expanses of telecommunications. It is a solution that does not directly solve the problem at hand. It is a solution that can be reached only through a twisted interpretation of the law and a vitiation of economic reasoning and general common sense. That solution is nationwide price regulation. That is the regrettable solution the Commission has adopted.

The Commission's decision has broad consequences for the future of telecommunications regulation. In holding that essentially all packetized communications fall within federal jurisdiction, the Commission has dramatically diminished the States' role going forward, as such communications are fast becoming the dominant mode. Whatever the merits of this reallocation of authority, it is a reallocation that properly should be made only by Congress. It certainly should not be made, as here, by a self-serving federal agency acting unilaterally.

There is doubtlessly underway a publicity campaign by the proponents of today's action. It will spin nationwide mandatory price regulation as "deregulation." It will spin the abandonment of States and contracts as "good government."

The media might be spun by this campaign. The public might be spun. But it will be far more difficult to convince the courts that the current action is lawful.

A Flawed Order From Flawed Decisionmaking

Today's order is the product of a flawed decisionmaking process that occurs all too frequently in this agency. It goes like this. First, the Commission settles on a desired outcome, based on what it thinks is good "policy" and without giving a thought to whether that outcome is legally supportable. It then slaps together a statutory analysis. The result is an order like this one, inconsistent with the Commission's precedent and fraught with legal difficulties.

In March 2000, the Court of Appeals for the D.C. Circuit vacated the Commission's conclusion that section 251(b)(5) does not apply to calls made to Internet service providers ("ISPs"). *See Bell Atlantic*, 206 F.3d at 9. The court ruled that, among other things, the Commission had not provided a "satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as 'terminating . . . local telecommunications traffic,' and why such traffic is 'exchange access' rather than 'telephone exchange service.'" *Id.*

The Commission has taken more than a year to respond to the court's remand decision. My colleagues some time ago decided on their general objective – asserting section 201(b) jurisdiction over ISP-bound traffic and permitting incumbent carriers to ramp down the payments that they make to competitive ones. The delay in producing an order is attributable to the difficulty the Commission has had in putting together a legal analysis to support this result, which is at odds with the agency's own precedent as well as the plain language of the statute.

Today, the Commission rules, once again, that section 251(b)(5) does not apply to ISP-bound traffic. In a set of convoluted arguments that sidestep the court's objections to its previous order, the Commission now says that ISP-bound traffic is "information access," which, the Commission asserts, is excluded "from the universe of 'telecommunications' referred to in section 251(b)(5)" (Order ¶¶ 23, 30) – despite the Commission's recent conclusion in another context that "information access" is not a separate category of service exempt from the requirements of section 251. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd 385, ¶¶ 46-49 (1999) ("*Advanced Services Remand Order*").

The result will be another round of litigation, and, in all likelihood, this issue will be back at the agency in another couple of years. In the meantime, the uncertainty that has clouded the issue of compensation for ISP-bound traffic for the last five years will continue. The Commission would act far more responsibly if it simply recognized that ISP-bound traffic comes within section 251(b)(5). To be sure, this conclusion would mean that the Commission could not impose on these communications any rule that it makes up, as the agency believes it is permitted to do under section 201(b). Rather, the Commission would be forced to work within the confines of sections 251(b)(5) and 252(d)(2), which, among other things, grant authority to State commissions to decide on "just and reasonable" rates for reciprocal compensation. 47 U.S.C. § 252(d)(2). But the Commission surely could issue "rules to guide the state-commission judgments" regarding reciprocal compensation (*Iowa Utilities Bd.*, 525 U.S. at 385) and perhaps could even put in place the same compensation scheme it orders here. At the same time, the confusion that this order will add to the agency's already bewildering precedent on Internet-related issues would be avoided.

The Commission's Previous Order and the Court's Remand Decision

To see how far the Commission has come in its attempt to assert section 201(b) jurisdiction over ISP-bound traffic, let us briefly review the court's decision on the Commission's previous order, which receives little attention in the order released today. In its previous order, issued in February 1999, the Commission focused on the jurisdictional nature of ISP-bound traffic. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689 (1999) ("*Reciprocal Compensation Declaratory Ruling*"). Applying an "end-to-end" analysis, the agency concluded that calls to ISPs do not terminate at the ISP's local server, but instead continue to the "ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state." *Id.* ¶ 12. Based on this jurisdictional analysis, the Commission ruled that a substantial portion of calls to ISPs are jurisdictionally interstate, and it described ISP-bound traffic as interstate "access service." *Id.* ¶¶ 17, 18. The Commission reasoned that, since reciprocal compensation is required only for the transport and termination of *local* traffic, section 251(b)(5)'s obligations did not apply to ISP-bound calls. *See id.* ¶¶ 7, 26.

1. The Court Asked the Commission Why ISPs Are Not Like Other Local Businesses

The court vacated the Commission's decision. It held that, regardless of the jurisdictional issue, the Commission had not persuasively distinguished ISPs from other businesses that use communications services to provide goods or services to their customers. *See Bell Atlantic*, 206 F.3d at 7. In the court's view, the Commission had failed to explain why "an ISP is not, for purposes of reciprocal compensation, 'simply a communications-intensive business end user selling a product to other consumer and business end-users.'" *Id.* (citation omitted).

2. The Court Asked the Commission Why Calls Do Not Terminate at ISPs

The court also questioned the Commission's conclusion that a call to an ISP did not "terminate" at the ISP. "[T]he mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP." *Id.* The court concluded that, "[h]owever sound the end-to-end analysis may be for jurisdictional purposes," the Commission had failed to explain why treating these "linked telecommunications as continuous works for purposes of reciprocal compensation." *Id.*

3. The Court Asked the Commission How Its Treatment of ISP-Bound Traffic Is Consistent with Its Treatment of Enhanced Service Providers

The court also wondered whether the Commission's treatment of ISP-bound traffic was consistent with the approach it applies to enhanced service providers ("ESPs"), which include ISPs. *See id.* at 7-8. The Commission has long exempted ESPs from the access charge system, effectively treating them as end-users of local service rather than long-distance carriers. The court observed that this agency, in the Eighth Circuit access charge litigation, had taken the position "that a call to an information service provider is really like a call to a local business that then uses the telephone to order wares to meet the need." *Id.* at 8. The court rejected as "not very compelling" the Commission's argument that the ESP exemption is consistent with the understanding that ESPs use interstate access services. *Id.*

4. The Court Asked the Commission Whether ISP-Bound Traffic is "Exchange Access" or "Telephone Exchange Service"

Finally, the court rejected the Commission's suggestion that ISPs are "users of access service." *Id.* The court noted that the statute creates two statutory categories – "telephone exchange service" and "exchange access" – and observed that on appeal, the Commission had conceded that these categories occupied the field. *Id.* If the Commission had meant to say that ISPs are users of "exchange access," wrote the court, it had "not provided a satisfactory explanation why this is the case." *Id.*

The Commission's Latest Order

Today, the Commission fails to answer any of the court's questions. Recognizing that it could not reach the desired result within the framework it used previously, the Commission offers up a completely new analysis, under which it is irrelevant whether ISP-bound traffic is "local" rather than "long-distance" or "telephone exchange service" rather than "exchange access."

In today's order, the Commission concludes that section 251(b)(5) is not limited to local traffic as it had previously maintained, but instead applies to all "telecommunications" traffic except the categories specifically enumerated in section 251(g). *See* Order ¶¶ 32, 34. The Commission concludes that ISP-bound traffic falls within one of these categories – "information access" – and is therefore exempt from section 251(b)(5). *See id.* ¶ 42. The agency wraps up with a determination that ISP-bound traffic is interstate, and it thus has jurisdiction under section 201(b) to regulate compensation for the exchange of ISP-bound traffic. *See id.* ¶¶ 52-65.

The Commission's latest attempt to solve the reciprocal compensation puzzle is no more successful than were its earlier efforts. As discussed below, its determination that ISP-bound traffic is "information access" and, hence, exempt from section 251(b)(5) is inconsistent with still-warm Commission precedent. Moreover, its interpretation of section 251(g) cannot be reconciled with the statute's plain language.

1. Today's decision is a complete reversal of the Commission's recent decision in the *Advanced Services Remand Order*. In that order, the Commission rejected an argument that xDSL traffic is exempt from the unbundling obligations of section 251(c)(3) as "information access." Among other things, the Commission found meritless the argument that section 251(g) exempts "information access" traffic from other requirements of section 251. *Id.* ¶ 47. Rather, the Commission explained, "this provision is merely a continuation of the equal access and nondiscrimination provisions of the Consent Decree until superseded by subsequent regulations of the Commission." *Id.* According to the Commission, section 251(g) "is a transitional enforcement mechanism that obligates the incumbent LECs to continue to abide by equal access and nondiscriminatory interconnection requirements of the MFJ." *Id.* The Commission thus concluded that section 251(g) was not intended to exempt xDSL traffic from section 251's other provisions. *See id.* ¶¶ 47-49.

In addition, the Commission rejected the contention that "information access" is a statutory category distinct from "telephone exchange service" and "exchange access." *See id.* ¶ 46.[1] It pointed out that "'information access' is not a defined term under the Act, and is cross-referenced in only two transitional provisions." *Id.* ¶ 47. It ultimately concluded that nothing in the Act suggests that "information access" is a category of services mutually exclusive with exchange access or telephone exchange service. *See id.* ¶ 48.

The Commission further determined that ISP-bound traffic is properly classified as "exchange access." *See id.* ¶ 35. It noted that exchange access refers to "access to telephone exchange services or facilities for the purpose of originating or terminating communications that travel outside an exchange." *Id.* ¶ 15. Applying this definition, and citing the *Reciprocal Compensation Declaratory Ruling*, the Commission reasoned that the service provided by the local exchange carrier to an ISP is ordinarily exchange access service, "because it enables the ISP to transport the communication initiated by the end-user subscriber located in one exchange to its ultimate destination in another exchange, using both the services of the local exchange carrier and in the typical case the telephone toll service of the telecommunications carrier responsible for the interexchange transport." *Id.* ¶ 35.

The *Advanced Services Remand Order* was appealed to the D.C. Circuit. *See WorldCom*, 2001 WL 395344. The Commission argued to the court in February that the term "information access" is merely "a holdover term from the MFJ, which the 1996 Act supersedes." *WorldCom, Inc. v. FCC*, Brief for Respondents at 50 (D.C. Cir. No. 00-1002). Its brief also emphasized that section 251(g) was "designed simply to establish a transition from the MFJ's equal access and nondiscrimination provisions . . . to the new obligations set out in the statute." *Id.*

Today, just two months after it made those arguments to the D.C. Circuit, the Commission reverses itself. It now says that section 251(g) exempts certain categories of traffic, including "information access," entirely from the requirements of section 251(b)(5) and that ISP-bound traffic is "information access." *See* Order ¶¶ 32, 34, 42. The Commission provides nary a

[1] This aspect of the *Advanced Services Remand Order* was remanded to the Commission by the D.C. Circuit because of its reliance on the vacated *Reciprocal Compensation Declaratory Ruling*. *See WorldCom, Inc. v. FCC*, No. 00-1062, 2001 WL 395344, *5-*6 (D.C. Cir. Apr 20, 2001).

word to explain this reversal.

Of course, the Commission's conclusions in the *Advanced Services Remand Order* that ISP-bound traffic is "exchange access" and that the term "information access" has no relevance under the 1996 Act were themselves reversals of earlier Commission positions. In the *Non-Accounting Safeguards Order*,[2] the Commission concluded, relying in part on a purported distinction between "exchange access" and "information access," that ISPs "do not use exchange access as it is defined by the Act." *Id.* ¶ 248. In that order, the Commission was faced with determining the scope of section 272(e)(2), which states that a Bell operating company ["BOC"] "shall not provide any facilities, services, or information regarding its provision of exchange access to [a BOC affiliate] unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions." 47 U.S.C. § 272(e)(2). The Commission rejected the argument that BOCs are required to provide exchange access to ISPs, reasoning that ISPs do not use exchange access. *See Non-Accounting Safeguards Order* ¶ 248. In making that decision, the Commission relied on the language of the statute as well as the MFJ's use of the term "information access." *See id.* ¶ 248 & n. 621. As the Commission explained, its "conclusion that ISPs do not use exchange access is consistent with the MFJ, which recognized a difference between 'exchange access' and 'information access.'" *Id.* ¶ 248 n.621.

Thus, in reversing itself yet again, the Commission here follows a time-honored tradition. When it is expedient to say that ISPs use "exchange access" and that there is no such thing as "information access," that is what the Commission says. *See Advanced Service Remand Order* ¶¶ 46-48. When it is convenient to say that ISPs use the local network like local businesses, then the Commission adopts that approach. *See Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 345 (1997). And, today, when it helps to write that ISPs use "information access," then that is what the Commission writes. The only conclusion that one can soundly draw from these decisions is that the Commission is willing to make up whatever law it can dream up to suit the situation at hand.

Nevertheless, there is one legal proposition that the Commission has, until now, consistently followed – a fact that is particularly noteworthy given the churn in the Commission's other legal principles. The Commission has consistently held that section 251(g) serves only to "preserve[] the LECs' existing equal access obligations, originally imposed by the MFJ." *Operator Communications, Inc., D/B/A Oncor Communications*, Memorandum Opinion and Order, 14 FCC Rcd 12506, ¶ 2 n.5 (1999).[3] Today's order ignores this precedent and

[2] *Implementation of the Non-Accounting Safeguards Of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) ("*Non-Accounting Safeguards Order*").

[3] *See also, e.g., Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U S West Petitions To Consolidate Latas in Minnesota and Arizona*, Memorandum Opinion and Order, 14 FCC Rcd 14392, ¶ 17 (1999) ("In section 251(g), Congress delegated to the Commission sole authority to administer the 'equal access and nondiscriminatory interconnection restrictions and obligations' that applied under the AT&T Consent Decree."); *AT&T Corporation, et al., Complainants*, Memorandum Opinion and Order, 13 FCC Rcd 21438, ¶ 5 (1998) ("Separately, section 251(g) requires the BOCs, both pre- and post-entry, to treat all interexchange carriers in accordance with their preexisting equal access and nondiscrimination obligations, and (continued....)

transforms section 251(g) into a categorical exemption for certain traffic from section 251(b)(5). It is this transformation – much more than the shell game played with "information access" and "exchange access" – that is most offensive in today's decision.

2. The Commission's claim that section 251(g) "excludes several enumerated categories of traffic from the universe of 'telecommunications' referred to in section 251(b)(5)" (Order ¶ 23) stretches the meaning of section 251(g) past the breaking point. Among other things, that provision does not even mention "exclud[ing]," "telecommunications," "section 251(b)(5)," or "reciprocal compensation."

Section 251(g), which is entitled, "Continued enforcement of exchange access and interconnection requirements," states in relevant part:

> On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996.

47 U.S.C. § 251(g).

As an initial matter, it is plain from reading this language that section 251(g) has absolutely no application to the vast majority of local exchange carriers, including those most affected by today's order. The provision states that "each local exchange carrier . . . shall provide [the enumerated services] . . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations . . . *that apply to such carrier on the date immediately preceding February 8, 1996.*" *Id.* (emphasis added). If a carrier was not providing service on February 7, 1996, no restrictions or obligations applied to "such carrier" on that date, and section 251(g) would appear to have no impact on that carrier. The Commission has thus repeatedly stated that section 251(g) applies to "Bell Operating Companies" and is intended to incorporate aspects of the MFJ. *Applications For Consent To The Transfer Of Control Of Licenses And Section 214 Authorizations From Tele-Communications, Inc., Transferor To AT&T Corp., Transferee.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, ¶ 53 (1999); *see also* cases cited *supra* note 3. Accordingly, by its express terms, section 251(g) says nothing about the obligations of most CLECs serving ISPs, which are the primary focus of the Commission's order.

Moreover, it is inconceivable that section 251(g)'s preservation of pre-1996 Act "equal access and nondiscriminatory interconnection restrictions and obligations" is intended to displace

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thereby neutralize the potential anticompetitive impact they could have on the long distance market until such time as the Commission finds it reasonable to revise or eliminate those obligations.").

section 251(b)(5)'s explicit compensation scheme for local carriers transporting and terminating each other's traffic. Prior to passage of the 1996 Act, there were no rules governing compensation for such services, whether or not an ISP was involved. It seems unlikely, at best, that Congress intended the absence of a compensation scheme to preempt a provision explicitly providing for such compensation.[4] At the very least, one would think Congress would use language more explicit than that seized upon by the Commission in section 251(g).

Finally, if, as the Commission maintains, section 251(g) "excludes several enumerated categories of traffic from the universe of 'telecommunications' referred to in section 251(b)(5)" (Order ¶ 23), why does section 251(g) not also exclude this traffic from the "universe of 'telecommunications'" referred to in the rest of section 251, or, indeed, in the entire 1996 Act? As noted, section 251(g) nowhere mentions "reciprocal compensation" or even "section 251." In fact, there appears to be no limiting principle. It would thus seem that, under the Commission's interpretation, the traffic referred to in section 251(g) is exempt from far more than reciprocal compensation – a consequence the Commission is sure to regret. *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order 11 FCC Rcd 15499, ¶ 356 (1996) (concluding that "exchange access" provided to IXCs is subject to the unbundling requirements of section 251(c)(3)).

* * *

The end result of today's decision is clear. There will be continued litigation over the status of ISP-bound traffic, prolonging the uncertainty that has plagued this issue for years. At the same time, the Commission will be forced to reverse itself yet again, as soon as it dislikes the implication of treating ISP-bound traffic as "information access" or reading section 251(g) as a categorical exemption from other requirements of the 1996 Act. The Commission could, and should, have avoided these consequences by applying its original analysis in the manner sought by the court.

[4] The case of IXC traffic is thus completely different. There was a compensation scheme in effect for such traffic prior to enactment of the 1996 Act – the access charge regime. Because reciprocal compensation and the access charge regime could not both apply to the same traffic, the Commission could reasonably conclude that the access charge regime should trump the reciprocal compensation provision of section 251(b)(5). *See Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068, 1072-73 (8th Cir. 1997). Here, there is no pre-1996 Act compensation scheme to conflict with reciprocal compensation. As the Commission has stated, "the Commission has never applied either the ESP exemption or its rules regarding the joint provision of access to the situation where two carriers collaborate to deliver traffic to an ISP." *Reciprocal Compensation Declaratory Ruling* ¶ 26.